Public Prosecutor v Elwan bin Abd Rahim

HIGH COURT (TAWAU) — CRIMINAL APPEAL NO T(42) 24 OF 2009
JOHN KO WAI SENG JC
9 NOVEMBER 2009

Criminal Law — Penal Code — s 326 — Voluntarily causing grievous hurt with sword — Group fight involving single invasive melee situation — Appellant sentenced to imprisonment and whipping — Whether separate and concurrent sentences for each charge properly made based on relevant facts

Criminal Procedure — Appeal — Appeal against sentence by prosecution — Two charges of voluntarily causing grievous hurt — Group fight involving single invasive melee situation — Appellant sentenced to imprisonment and whipping — Whether sentence excessive — Whether failure to apply right principles — Whether separate and concurrent sentences for each charge properly made based on relevant facts — Penal Code s 326

Criminal Procedure — Sentence — Voluntarily causing grievous hurt — Whether offences committed in one single transaction and not distinct and separate offences — Appellant sentenced to imprisonment and whipping — Whether separate and concurrent sentences for each charge properly made based on relevant facts — Penal Code s 326

In the sessions court, the accused had pleaded guilty to the following two offences: (i) that the accused and one other person still at large had with common intention caused grievous hurt to one Zulkifli, an offence punishable under s 326 of the Penal Code ('Code'); and (ii) that the accused and one other person still at large had with common intention caused grievous hurt to one Suhardi, an offence punishable under s 326 of the Code. For the first offence, the accused was sentenced to two years imprisonment and two strokes of whipping. For the second offence, the accused was sentenced to three years imprisonment and four strokes of whipping. Both sentences were ordered to run concurrently. The prosecution appealed against the sentences contending that the learned sessions court judge had failed to balance the interest of the public, the seriousness of the offence of causing of grievous hurt by the accused with two others using 'pedang samurai' and the rampancy of such incidents. The prosecution contended that two separate offences were committed and therefore the sentences should run consecutively.

Held, dismissing the appeal:

(1) It is a firmly established principle that an appellate court would be slow to

disturb the sentence imposed by the lower courts unless the sentence is excessive to such an extent as to satisfy the court that when it was passed there was a failure to apply the right principles (see para 4).

(2) The learned sessions court judge had properly taken into consideration that the accused had pleaded guilty and was a first offender. She had given due consideration to the seriousness and rampancy of the offences committed. Most importantly, she noted the minimal contribution of the accused towards inflicting the kind of injuries suffered by the complainants during the group fight. The sentencing of the accused to imprisonment and whipping were properly made within the discretion on the relevant facts before the learned sessions court judge (see paras 12–13).

(3) In relation to the individual sentences meted out to the accused on the two charges, there was no error. The individual sentences were reasonable and commensurated with the offences committed and should not be disturbed (see para 13).

(4) The learned sessions court judge had considered this to be group fight, a single invasive melee situation thereby differentiating it from two distinct incidents involving two separate individuals. It was within her discretion which she had properly exercised whether she would want to impose consecutive sentences in a single melee situation which she had not because of consideration of the sufficiency of adding whipping to reflect the seriousness of the offences committed by the accused (see para 14).

[Bahasa Malaysia summary

Di mahkamah sesyen, tertuduh telah mengaku bersalah kepada kedua-dua kesalahan berikut: (i) bahawa tertuduh dan seorang lagi yang masih bebas mempunyai niat bersama menyebabkan cedera parah kepada Zulkifli, kesalahan yang boleh dihukum di bawah s 326 Kanun Keseksaan ('Kanun'); dan (ii) bahawa tertuduh dan seorang lagi yang masih bebas mempunyai niat bersama menyebabkan cedera parah kepada Suhardi, kesalahan yang boleh dihukum di bawah s 326 Kanun. Untuk kesalahan pertama, tertuduh dihukum dua tahun penjara dan dua sebatan rotan. Untuk kesalahan kedua, tertuduh dihukum tiga tahun penjara dan empat sebatan rotan. Kedua-dua hukuman diperintah dijalankan dengan serentak. Pihak pendakwaan merayu terhadap hukuman dengan berhujah bahawa hakim mahkamah sesyen gagal untuk mengimbangkan kepentingan awam, keseriusan kesalahan menyebabkan cedera parah oleh tertuduh dengan dua orang lagi menggunakan pedang samurai dan kejadian-kejadian sedemikian menjadi-jadi. Pihak pendakwaan berhujah bahawa dua kesalahan berasingan dilakukan dan hukuman-hukuman sepatutnya berjalan secara berturut-turut.

Diputuskan, menolak rayuan:

(1) Ia adalah prinsip yang ditetapkan bahawa mahkamah rayuan tidak akan

campur tangan dengan hukuman yang dikenakan oleh mahkamah rendah kecuali hukuman tersebut adalah berlebihan sehingga ia memuaskan mahkamah bahawa apabila ia dijatuhkan terdapat kegagalan untuk menggunapakai prinsip-prinsip yang betul (lihat perenggan 4).

(2) Hakim mahkamah sesyen yang bijaksana telah mempertimbangkan dengan betul bahawa tertuduh telah mengaku bersalah dan adalah pesalah kali pertama. Beliau telah memberi pertimbangan betul kepada keseriusan kesalahan-kesalahan yang dilakukan yang menjadi-jadi. Yang paling penting, beliau mengambilkira sumbangan minima tertuduh yang mengakibatkan jenis kecederaan-kecederaan yang dialami oleh pengadu-pengadu semasa pergaduhan kumpulan. Hukuman tertuduh kepada pemenjaraan dan sebatan dibuat secara betul dalam budi bicara atas fakta-fakta relevan di hadapan hakim mahkamah sesyen (lihat perenggan 12–13).

(3) Berkaitan hukuman-hukuman individu yang dikenakan kepada tertuduh atas dua tuduhan tersebut, tidak terdapat kesilapan. Hukuman-hukuman individu adalah munasabah dan setara dengan kesalahan-kesalahan yang dilakukan dan tidak patut campur tangan (lihat perenggan 13).

(4) Hakim mahkamah sesyen yang bijaksana telah mempertimbangkan ini adalah pergaduhan kumpulan, satu kejadian menyerang yang kelam-kabut dengan itu membezakannya daripada dua kejadian berbeza melibatkan dua individu berlainan. Ia adalah dalam budi bicaranya yang telah dijalankan secara betul olehnya sama ada beliau hendak mengenakan hukuman-hukuman berturut-turut dalam satu kejadian kelam-kabut yang beliau tidak lakukan kerana pertimbangan cukup dengan menambah sebatan rotan yang membayangkan keseriusan kesalahan-kesalahan yang dilakukan oleh tertuduh (lihat perenggan 14).]

Notes

For cases on appeal generally, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 152–823.

For cases on s 326 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1832–1841.

For cases on voluntarily causing grievous hurt, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4685–4686.

Cases referred to

Ang Chai Seng v PP [2000] 2 MLJ 35; [2000] 1 CLJ 213, CA (refd)

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83; [1981] 1 LNS 139, FC (refd)

Kanagasuntharam v PP [1992] 1 SLR 81 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256; [1976] 1 LNS 102 (refd)
R v Kenneth John Ball (1951) 35 Cr App R 164 (refd)
Vitos v R (1981) 4 A Crim R 238 (refd)

Raja Zaizul Faridah bt Raja Zaharudin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

John Ko Wai Seng JC:

[1] In the sessions trial court, the accused pleaded guilty to the following two offences:

> First Amended Charge
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> Bahawa kamu bersama dua lagi yang masih bebas, pada 13hb Februari 2008, jam lebih kurang 1.00 pagi, bertempat di atas Jambatan Blok 5 dan 6, Kampong Titingan, di dalam daerah Tawau, di dalam Negeri Sabah, dengan niat bersama, telah dengan sengaja mendatangkan cedera parah kepada ZULKIFLI BIN ZAKARIA L/27 THN. ARAB, oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 326 Kanun Kesiksaan dan dibaca bersama Seksyen 34 Kanun yang sama.
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> Second Amended Charge
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> Bahawa kamu bersama dua lagi yang masih bebas, pada 13hb Februari 2008, jam lebih kurang 1.00 pagi, bertempat di atas Jambatan Blok 5 dan 6, Kampong Titingan, di dalam daerah Tawau, di dalam Negeri Sabah, dengan niat bersama, telah dengan sengaja mendatangkan cedera parah kepada SUHARDI BIN NUSKI I/31 THN. BUGIS, oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 326 Kanun Kesiksaan dan dibaca bersama Seksyen 34 Kanun yang sama bersama dua lagi yang.

[2] The prosecution had lodged an appeal against the sentences of the learned sessions court judge made on 11 June 2009:

(a) first offence: two years imprisonment and two strokes of whipping; and

(b) second offence: three years imprisonment and four strokes of whipping or the second offence,

both sentences to run concurrently.

[3] The prosecution's grounds of appeal contended that the learned sessions court judge had failed to balance the interest of the public, the seriousness of the offence of causing of grievous hurt by the accused with two others using 'pedang samurai' and the rampancy of such incidents. The prosecution contended that two separate offences were committed, and appeals for the sentences to run consecutively.

[4] The principles to be applied in an appeal against sentence:

> ... the appellate court is ready to interfere with the sentence imposed by the trial court upon proof of one or more of the following circumstances: (a) The sentence imposed by the trial court was manifestly excessive or inadequate. (b) There is a manifest error either in law or in considering the facts and circumstances of the case. (c) The sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. (d) The trial court has given undue weight to some of the evidence. (e) The trial court, in fixing the sentence, had failed to adequately consider all the relevant factors either for or against the offender. (f) The sentence was wrong in law. (g) The unsatisfactory features of the proceedings in the lower court. (h) The charge has been hanging over the accused's head for a considerable period. (i) Justice do not appear to have been done.
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> (*Civil and Criminal Appeals in Malaysia* by Tan Kee Heng at pp 191–192).

It is 'a firmly established principle that an appellate court would be slow to disturb the sentence imposed by the lower courts unless the sentence is excessive to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles then this court will intervene' (*R v Kenneth John Ball* (1951) 35 Cr App R 164). Hashim Yeop Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257G; [1976] 1 LNS 102 also said: 'It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.' (see *Ang Chai Seng v Public Prosecutor* [2000] 2 MLJ 35; [2000] 1 CLJ 213 per Haidar JCA, as he then was).

[5] In *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139, the Federal Court per Raja Azlan Shah Ag LP (as HRH then was) at p 84 imparted the following guide:

> As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient per se to warrant this court's interference. For a

discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion.

[6] The prosecution has urged that the sentences of the accused should be ordered to run consecutively instead of cumulatively, this court will have to be guided by the one transaction rule and the totality principle. The Court of Appeal in *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572 per Augustine Paul JCA, had this to say:

> The combined effect of s 282 and s 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v Public Prosecutor* 1990] 1 MLJ 88; [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v Saleem* [1964] Crim LR 482; *R v Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; [1979] 1 LNS 36; *Amrita Lal Hazra v Emperor* 42 Cal 957; *Chin Choy v Public Prosecutor* [1955] MLJ 236; [1955] 1 LNS 17). The rule, however, is not absolute.

Yong Pung How CJ said in *Kanagasuntharam v Public Prosecutor* [1992] 1 SLR 81 at p 83:

> The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v Faulkner* (1972) 56 Cr App R 594, *R v Wheatley* (1983) 5 Cr App R (S) 417 and *R v Skinner* (1986) 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentence may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

[7] On the totality principle DA Thomas in *Principles of Sentencing*, (2nd Ed) at pp 57–58 stated:

> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the

normal level of sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender a 'crushing sentence' not in keeping with his record and prospects.

[8] On the same note *Emmins on Sentencing* (2nd Ed) at p 151 stated:

> It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.
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> There will be cases properly described as crushing the hope in the offender of reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account (see *Crowley and Garner v R* (1991) 55 A Crim R 201).

[9] In *Vitos v R* (1981) 4 A Crim R 238 at p 301 O'Bryan J said:

> It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design.

[10] It is generally accepted in sentencing that 'where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive' (Thomas, *Principles of Sentencing*, (2nd Ed) at p 53).

[11] In a single melee situation Thomas, *Principles of Sentencing*, (2nd Ed) at p 53 further states: 'The essence of the one transaction rule appears to be that consecutive sentences are inappropriate when all the offences taken together constitute a single invasion of the same legally protected interest. The principle applies when two or more offences arise from the facts as when the same series of blows constitutes assault occasioning actual bodily harm and wilful treatment of a child or malicious wounding and indecent assault.'

[12] In the instant case, from the grounds of sentence (at p 25 of the appeal record), the learned sessions court judge had properly taken into consideration that the accused had pleaded guilty and was a first offender. She had given due consideration to the seriousness and rampancy of the offences committed. Most important she noted the minimal contribution of the accused towards inflicting the kind of injuries suffered by the complainants during the group fight.

[13] Based on the sentencing principles cited before, the sentences of the accused to imprisonment and whipping in my opinion are properly made within the discretion on the relevant facts before the learned sessions court judge. In relation to the individual sentences meted out to the accused on the two charges, there was no error. The plea in mitigation, all factors of the case and its gravity, rampancy of the offence and the public interest were all properly taken into account by the learned sessions court judge in arriving at the sentences. The individual sentences were reasonable and commensurate with the offences committed and should not be disturbed.

[14] In respect of the prosecution's urging on appeal for the sentences to be made consecutive, the learned sessions court judge had considered this to be group fight, a single invasive melee situation thereby differentiating it from two distinct incidents involving two separate individuals, it is within her discretion which she had properly exercised whether she would want to impose consecutive sentences in a single melee situation which she had not because of consideration of the sufficiency of adding whipping to reflect the seriousness of the offences committed by the accused.

[15] For those reasons, it is hereby ordered that the prosecution's appeal against the sentences of the accused be dismissed.

Appeal dismissed.

Reported by Kanesh Sundrum